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No. 99-1756

Supreme Court, U.S.
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In The

Supreme Court of the United States

GREAT WESTERN CASINOS, INC.,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS, TRIBAL COUNCIL OF THE MORONGO BAND OF MISSION INDIANS, ADELAIDE PRESLEY, MARY ANN ANDREAS, CHARLES G. MARTIN, FRANK LYNCH, FRANK LUGO, JR., JOHN E. ALLEN, RODNEY MATTHEWS, DENNIS B. MILLER, SHIRLEY BLOCKER, BARBARA A. CALDERON, CALVIN T. MARTIN, CLIVE MILLER, SARAH E. NECOCHEA, ORLEN HOUGH, CLINTON HOUGH, SR., ALEXANDER & KARSHMER, a law partnership, BARBARA KARSHMER,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

REPLY TO BRIEF IN OPPOSITION

LAW OFFICES OF
BRIAN D. MCMAHON
BRIAN D. MCMAHON
12121 Wilshire Boulevard
Suite 1120
Los Angeles, California
90025
(310) 473-7770

BENEDON & SERLIN
GERALD M. SERLIN*
DOUGLAS G. BENEDON
21700 Oxnard Street
Suite 1290
Woodland Hills, California
91367
(818) 340-1950
Counsel of Record

Attorneys for Petitioner
Great Western Casinos, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

This case presents two important issues of constitutional law that should be settled by this Court: (1) Whether the doctrine of sovereign immunity accorded to Indian Tribes extends to non-Tribe defendants and (2) whether an action against non-Tribe defendants is preempted by federal law despite Congress's mandate, codified at 28 U.S.C. § 1360, specifying that California's state courts shall have jurisdiction over civil causes of action in which Indians are a party. Resolution of these issues is critical because Tribes and their members are now regularly involved in commercial activities, including gambling and casinos. None of Respondents' arguments supports denial of certiorari.

LEGAL DISCUSSION

I.

THE STATE COURT'S RULING WAS BASED ON SOVEREIGN IMMUNITY AND PREEMPTION, NOT CONTRACT INTERPRETATION.

In opposition to the petition filed by Great Western Casinos, Inc. ("Petitioner"), Respondents first claim "the State court based its judgment on the plain terms of the Agreement and the other uncontroverted record evidence." Opp. at 12. For that reason, Respondents conclude there is "no basis for review by this Court." *Ibid.* This argument fails for want of factual support.

As the State appellate court explained, "[t]he trial court granted the defendants' motion to quash and dismissed the action. The trial court found GWC's [Petitioner's] action was barred by the separate and independent grounds of federal preemption and sovereign immunity." Pet. App. at 2; see also Pet. App. at 9 (Appellate court reiterated "[i]n this case defendants moved to stay/quash/dismiss on the dual grounds of federal preemption and sovereign immunity").

The State Court of Appeal's opinion then addressed these two grounds, resolving that "the Tribe did not waive its sovereign immunity for purposes of this suit" (Pet. App. at 16-19), "the individual defendants are similarly immune from suit" (Pet. App. at 20-25), and "federal law has completely preempted the field of Indian gaming, thus the state court had no jurisdiction over the claims raised in the complaint" (Pet. App. at 25-30).

The State appellate court's determination that the Tribe had not waived its tribal immunity under the Agreement – because specified conditions precedent had not occurred (Pet. App. at 17-19) – does not resolve whether the non-Tribe defendants are accorded immunity. This follows from the fact that the non-Tribe defendants, including the Indian Tribal Council, Tribal Council members, Tribe members, and the Tribe's attorneys, were not parties to the Agreement. Only Petitioner and the Tribe were. As such, the State Court of Appeal could not resolve Petitioner's claim against the non-Tribe defendants based on the terms of the Agreement.

II.

DEFENDANT TRIBAL COUNCIL, TRIBAL COUNCIL MEMBERS, TRIBE MEMBERS AND ATTORNEYS ARE NOT PROTECTED FROM CIVIL SUIT BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

Respondents forthrightly concede that this Court has questioned the rule of Tribal immunity from suit and recognize "this Court has stated that there may be 'reasons to doubt the wisdom of perpetuating the doctrine.' " Opp. at 13, citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Indeed, this Court has expressly acknowledged that there is a " 'trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction'. . . . " *Rice v. Rehner*, 463 U.S. 713, 718, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983).

Nonetheless, Respondents claim that Tribal immunity extends beyond the Tribe itself to its Tribal Council, the Tribal officers, the individual Tribe members, and the Tribal attorneys. Opp. at 15-17. This Court, however, has held the opposite. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State"), citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (A tribal officer is not protected by the Tribe's immunity from suit); *Puyallup Tribe, Inc. v. Dept. of Game of Washington*, 433 U.S. 165, 173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977).

Moreover, extension of immunity to non-Tribe defendants was particularly unwarranted here where Petitioner alleged that the non-Tribe defendants all exceeded the authority the Tribe was capable of bestowing upon them under federal laws by "concoct[ing] a fraudulent scheme to cancel the management contract and oust [Petitioner] from the gaming enterprise." App. at 6; compare *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030 (11th Cir. 1995). Thus, the non-Tribe defendants could not have been accorded immunity. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 691, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

Finally, allowing Petitioner's action against the non-Tribe defendants to proceed would have effectively compelled the Morongo Tribe to obey the law. See *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1988) (dis. opn. of Stevens, J.).

Here, Petitioner's action included claims not only against the Morongo Indians, but against its Tribal Council, its individual Tribal Council members, its individual Tribe members, and its Tribe's attorneys. Nonetheless, in a decision which conflicts with authority of this Court, the California Court of Appeal extended immunity to each of these non-Tribe defendants as derivative of the Tribe's immunity. Review by this Court is necessary to clarify the bounds of Tribal immunity.

III.

PETITIONER'S ACTION WAS NOT PREEMPTED BY FEDERAL LAW.

As Petitioner explained in its petition, Congress has begun delegating its authority to the states. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 471-472, 490, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). Public Law 280 – codified at 28 U.S.C. § 1360[1] – grants "jurisdiction over private civil litigation involving reservation Indians in state court." *Bryan v. Itasca County,* 426 U.S. 373, 385, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); see also *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1986); *Boisclair v. Superior Court,* 51 Cal.3d 1140, 1149-1150 (1990).

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[1] 28 U.S.C. § 1360 provides in relevant part:

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
. . . . .	
. . . . .	
California	All Indian country within the State."

Respondents, however, controvert that Petitioner's action against the Tribal Council, Tribal Council members, individual Tribe members, and the Tribe's attorneys was properly brought in state court. See Opp. at 18-22. According to Respondents, Petitioner's claims against the non-Tribe defendants was preempted by the Indian Gaming Regulatory Act (IGRA) 25 U.S.C. Section 2701. Respondents are mistaken.

In *Bryan v. Itasca County, supra,* this Court held that 28 U.S.C. Section 1360 granted state courts jurisdiction over private civil litigation involving reservation Indians. 426 U.S. at 385, 96 S.Ct. 2102, 48 L.Ed.2d 710; see also *California v. Cabazon Band of Mission Indians, supra,* 480 U.S. at 208, 107 S.Ct. at 1087, 94 L.Ed.2d at 254. Because "civil laws" include actions involving laws of general application, such as the law of contracts and torts – the basis of Petitioner's action here – Petitioner's action against the non-Tribe defendants was properly brought in state court. *California v. Cabazon Band of Mission Indians, supra,* 480 U.S. at 208; *Bryan v. Itasca County, supra,* 426 U.S. at 385.

Certiorari is appropriate to resolve this important question of federal preemption. Rules of the Supreme Court of the United States, Rule 10(c).

CONCLUSION

For the reasons stated above and in the Petition, Petitioner prays for a writ of certiorari, to issue to the Court of Appeal of California.

Dated: September 6, 2000

Respectfully submitted,

LAW OFFICES OF
BRIAN D. MCMAHON
BRIAN D. MCMAHON

BENEDON & SERLIN
GERALD M. SERLIN
DOUGLAS G. BENEDON

Attorneys for Petitioner,
Great Western Casinos, Inc.